Supreme Court, U.S.
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No. 98-1726

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1998

DR. MARVIN FRANDSEN,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Amicus Curiae, Brevard County, respectfully files its Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner in this case as follows:

OPINIONS BELOW

The opinions of the Fifth District Court of Appeals of Florida, the Eighteenth Judicial Circuit Court of Appeals of Florida, and the County Court of Brevard County, Florida, are included in the Appendix herein as Exhibit "A", Exhibit "B" and Exhibit "C", respectively.

JURISDICTION TO REVIEW

As discussed below, the reasons for review specified in the Petition fail to meet the criteria for the Court to exercise its certiorari discretion as enunciated in Rule 10(a), (b) and (c), Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioner questions the constitutionality of Brevard County Ordinance 95-21 (hereinafter "ordinance"). The full text of the ordinance is reproduced in the Appendix to Petitioner's Brief at page 9a.

STATEMENT OF THE CASE

Brevard County accepts as accurate Petitioner's statement of the procedural history of the case. Brevard County is unable to stipulate to Petitioner's version of the facts as set forth in various portions of his Brief, including his Statement of the Case. Brevard County respectfully requests that this Court rely on the record and to disregard the factual representations and/or characterizations which

are not supported by the record.[1]

It may be helpful to this Honorable Court to highlight the undisputed facts, which were relied upon by, and recited within the opinion of, the Eighteenth Judicial Circuit Court of Appeals of Florida as follows:

> It is undisputed that on September 9, 1995, appellant was observed on Playalinda Beach, at the Canaveral National Seashore Park, in Brevard County, Florida. The appellant was wearing no clothing other than a hat and an arm band. The appellant was carrying a sign with protest messages and he was speaking to a group of people at the time of his arrest.

See *Frandsen v. State*, Case No. 97-23494 ACA (Fla. 18th Cir. Ct. Sept. 28, 1998), Appendix, Exhibit "B", page 2b.

ARGUMENT FOR DENYING THE PETITION:

I. THE RULINGS OF THE LOWER COURTS IN THIS CASE ARE CONSISTENT WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

A. The lower courts' decisions are consistent with United States Supreme Court decisions regarding freedom of expression; and, Petitioner's actions did not fall within any exemption set forth in the ordinance.

Petitioner argues that his actions of "wearing no clothing

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[1] For example, the Petitioner volunteers (in the Argument section of his Brief, page 5) that the ordinance was "created and promulgated by the National Family Legal Foundation of Phoenix, Arizona, a religious right organization which has touted its goal of 1000 such ordinances in place by the year 2000." This statement, and the "statistics" which immediately follow, are not found in the record and contradict the reality that private organizations have no ability to promulgate public laws.

other than a hat and an armband" on a public beach while "carrying a sign with protest messages and . . . speaking to a group of people"[2] qualifies for an exemption under either section 6.b. or 6.c. of the Brevard County ordinance. However, each of those provisions in the ordinance apply only "when the conduct of being nude cannot constitutionally be prohibited by this ordinance. . ." Petitioner's argument fails because his conduct in appearing nude on a public beach *can* constitutionally be prohibited under the precedent established by this Honorable Court.

Local governments may prohibit public nudity whether or not it is combined with expressive activity otherwise protected by the First Amendment. *Barnes v. Glenn Theater, Inc.*, 501 U.S. 560, 115 L. Ed.2d 504, 111 S. Ct. 2456 (1991). In *Barnes*, a plurality decision, the four-part test enunciated in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed.2d 672, 88 S. Ct. 1673 (1967), was the common denominator among the justices voting to uphold the Indiana statute prohibiting public nudity as applied to nude dancing. The Court, at page 512, stated:

> "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

The Court found that regulating nudity in a public adult entertainment environment was not a violation of the First Amendment because (1) the legislation at issue was within the constitutional power of the government; (2) the legislation furthered the important or substantial government interest in protecting societal order and morality, as well as providing for the public health and safety; (3) the governmental interest was unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms was no greater than essential to

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[2] *Frandsen v. State*, Case No.97-23494-ACA (Fla. 18th Cir. Ct. Sept. 28, 1998), Appendix, Exhibit "B", page 2b.

the furtherance of the governmental interest.

In *Cafe 207, Inc. v. St. Johns County*, 856 F.Supp. 641 (M.D. Fla. 1994), *affirmed* 66 F.3d 273 (11th Cir. 1995), *cert. denied* 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996), a St. Johns County anti-nudity ordinance was upheld based on an analysis of the ordinance under the *O'Brien* four-part test employed in *Barnes*. The St. Johns County ordinance was used as a model for the Brevard County ordinance now in question. The district court found that the ordinance easily met the first three parts of the *O'Brien* test. As to the first part, the court simply said "The law (i.e., the ordinance), as an exercise of the county's police power, is clearly within its constitutional authority." *Cafe 207, Inc.* at 644. The court found that the ordinance served several substantial and important governmental interests, including the protection of order and morality, as well as the interest in combating the secondary effects of nudity. *Id.* The court held that those governmental interests are not related to the suppression of free speech as such. *Id.* Finally, the district court reviewed whether the incidental restriction on alleged First Amendment freedoms was no greater than essential to the furtherance of the governmental interests served by the ordinance. *Id* at 645. The court then concluded that the St. Johns County ordinance passed all four parts of the *O'Brien/Barnes* test and was therefore constitutional.

Similarly, Brevard County Ordinance 95-21 is constitutional under the above-described analysis. The ordinance was enacted as an exercise of the county's police power and within its constitutional authority. The ordinance serves several substantial and important governmental interests, which are found in the statement of intent in Section 2 of the ordinance which reads in part:

> It is the intent of the Board of County Commissioners, in enacting this ordinance, to prohibit the conduct of being nude in public places for the purpose of protecting societal order and morality and suppressing the adverse secondary effects that public nudity generates, as more specifically described in the findings. It is the intent of this ordinance to protect and preserve the health, safety, and welfare of the people of Brevard County by prohibiting any person from knowingly or

intentionally appearing nude in a public place.[3]

Furthermore, these stated governmental interests are not related to the suppression of free speech, and the incidental restriction on First Amendment freedoms, if any, is no greater than essential to the furtherance of these interests.

As the lower court in this case so aptly stated:

> The Brevard County Ordinance serves several important and substantial government interests, including the protection of Order and morality. The Ordinance was enacted as an exercise of the County's police power . . . The same constitution that guarantees a right of free speech also provides for a representative form of government that will pass laws consistent with the Constitution and will of the people. The people of Brevard County, speaking through their elected officials have said that public nudity is not an acceptable form of conduct. Keeping our public streets, parks and beaches free from naked people appears to be a goal that is consistent with the protection of societal order and morality, as well as one that helps to assure public health and safety. If such law somehow restricts First Amendment freedoms, this Court finds that restriction to be incidental to the important governmental interest.

Frandsen v. State, Circuit Court No.: 97-23494-ACA (Fla. 18th Cir. Ct. September 28, 1998).

In *State v. Davis*, Case Nos. 95-26139 COA and 95-25568 COA (Fla. Brevard Cty. Ct. Jul. 17, 1996),[4] Judge Philip Fougerousse

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[3] Appendix to Petitioner's Brief, page 9a.

[4] Judge Fougerousse's ruling was affirmed *per curiam* by a three judge circuit court appellate panel in *Davis v. State*, Case No. 96-19741-ACA (Fla. 18th Cir. Ct. Sept. 11, 1997). Full text of the trial court's ruling

applied the *O'Brien* test and upheld the Brevard County ordinance as applied to facts nearly identical to those at bar, where the Defendant Davis was arrested for standing on a public right-of-way topless with protest messages painted on her body. The County Court's order analyzed the Brevard County ordinance under the four-part *O'Brien* test and made specific findings, to-wit: that the ordinance was enacted within the constitutional authority of the County and its police powers, that it furthers important or substantial governmental interests, that the government interest is not related to the suppression of free expression, and that the incidental restrictions on the First Amendment freedoms of the defendant are no greater than essential to the furtherance of the governmental interests. Accordingly, the court held that the ordinance was valid.

Judge Fougerousse then considered the defendant's contention that, the First Amendment exempted her from the prohibition against public nudity because her topless appearance on a public right-of-way was accompanied by political speech in the form of a protest message painted on her body. Citing to *Adderley v. State*, 385 U.S. 39, 17 L. Ed.2d 149, 87 S. Ct. 242, *reh. den.*, 385 U.S. 1020, 17 L. Ed.2d 559, 87 S. Ct. 698 (1966), the trial court rejected that argument. In *Adderley,* the defendants were convicted of trespassing in connection with a protest at a jail site. The protesters claimed that they had selected a specific area outside the jail to conduct a civil rights protest and that as long as they were peacefully demonstrating in that area, the State had no right to enforce trespass laws against them. In affirming the convictions, the court stated,

> ". . . [S]uch an argument has as its unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on . . . We reject it again."

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and circuit court's affirmance are found in Appendix, Exhibits "D" and "E", respectfully.

[citations omitted].

Adderley, 385 U.S. at 47-48. *See also, Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 92 L. Ed 2d 568, 106 S. Ct. 3172 (1986).

Likewise, in the case at bar, Petitioner would have a First Amendment right to make his views known and to verbally express them in any public forum, however, in view of the county ordinance prohibiting public nudity, he cannot express those views in public while nude. Just as the First Amendment provided no exemption from prosecution to the defendants in *Adderley* when they protested while violating trespass laws, the fact that Petitioner was expressing a political message does not cloak him with First Amendment protection while violating the ordinance prohibiting public nudity.

In a similar case, *Shetler v. State*, 681 So. 2d 730 (Fla. 2d DCA 1996), Florida's Second District Court of Appeal upheld the conviction of a hotdog vendor arrested for wearing a T-back bathing suit in violation of the Polk County anti-nudity ordinance. The court rejected defendant's First Amendment claim, found that her conduct was fit for government regulation and that First Amendment protection was minimal. Further, the court held that the county's interest in protecting and preserving the health, safety, welfare, and morals of its citizens would justify any intrusion upon constitutionally protected expression.

For all the forgoing reasons, Brevard County respectfully submits that the ruling's of the lower courts in this case are consistent with the decisions of this Court regarding freedom of expression.

B. The lower courts' decisions are consistent with the United States Supreme Court decisions regarding overbreadth.

Petitioner also argues that the lower court decisions were erroneous when they held that the ordinance was not overly broad. Specifically, Petitioner contends that two of the ordinance's exemptions, section 6.b. and section 6.c., are unconstitutionally vague and overbroad on their face.

In *Café 207, Inc., supra,* a similar overbreadth argument was

enunciated against the St. Johns County, Florida, ordinance, to wit: that the St. Johns ordinance was unconstitutionally overbroad because it banned nudity associated with protected, serious theatrical performances such as *Hair* and *Equus*. The *Café 207* court observed that two issues are presented by such a challenge: 1) does the defendant have standing to assert the legislation is overbroad and, if standing is established, 2) what is the appropriate standard to be applied to the merits of the overbreadth claim. *Café 207, Inc.*, supra at 647.

The First Amendment overbreadth doctrine is an exception to the rule that a person will not be heard to challenge a statute based on how the statute might be applied to other people. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2915-16, 37 L. Ed.2d 830 (1973). The concern is that an overbroad law may "threaten others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Board of Airport Comm'rs v. Jews for Jesus*, Inc., 482 U.S. 569, 574, 107 S. Ct. 2568, 2572, 96 L.Ed.2d 500 (1987).

However, simply conceiving of a situation where the legislation would be unconstitutional as applied is not sufficient to succeed on an overbreadth claim. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 2126, 80 L.Ed.2d 772 (1984).

> "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort . . . [e]ven when first amendment rights are implicated, the impetus to apply the doctrine attenuates as the expression . . . moves from 'pure speech' toward conduct and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws" (Emphasis added) *Broadrick, supra,* at 615, 93 S. Ct. at 2916.

Thus, for the overbreadth claim to be entertained in such a case, the excessive scope of the statute or ordinance being reviewed must not only be real but substantial, and "not subject to cure through case-by-case analysis and limiting judicial construction or partial invalidation." See , *Café 207, Inc.*, 856 F.Supp at 648.

In the *Café 207, Inc.*, overbreadth challenge, the court held that the plaintiff lacked standing under the principles of *Broadrick, supra* and *Geaneas v. Willets*, 911 F.2d 579 (11th Cir.1990), that the alleged overbreadth was not real or substantial, and that whatever overbreadth may exist may be cured through case-by-case analysis, limiting construction or, if necessary, partial invalidation. *Café 207, Inc.* at 649. The court explained that even if there had been overbreadth as alleged, the St. Johns exemption language (Section 7(b)(i) and (ii) of that ordinance) would "step in to safeguard the protected speech," such as the aforementioned theatrical performances. See also *SBC Enterprises, Inc., supra* (upholding anti-nudity ordinance against, *inter alia*, similar overbreadth and vagueness challenges where ordinance prohibited all nudity in public and apparently lacked the first amendment exemptions which are present in the St. Johns and Brevard County Ordinances).

As mentioned above, the St. Johns Ordinance (as well as the *Café 207* case itself) was a model for Brevard's anti-nudity ordinance. Therefore, it is no mistake that the subject exemptions of the St. Johns ordinance (Section 7(b)(i) and (ii)) and the exemption language questioned in the instant ordinance (Section 6(b) and (c)) are nearly identical. Brevard County Ordinance 95-21, Section 6. Exemptions, states in pertinent part:

> b. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it constitutes a part of a bona fide live communication, demonstration or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain (see, for example, Barnes v. Glen Theatre Inc. . . and Hoffman v. Carson . . . ; or

> c. when the conduct of being nude cannot constitutionally be prohibited by this ordinance because it is otherwise protected by the United States Constitution or Florida Constitution under existing judicial decisions. . .

Additionally, just as in *Café 207, Inc.*, the Court has the added guidance from pertinent whereas clauses, such as:

> u. the exemptions contained in this ordinance provide adequate protection to persons who, without such exemptions, might be prevented or discouraged by this ordinance from exercising constitutionally protected rights; and
>
> v. this ordinance regulates conduct, not speech.

Just as the *Café 207* court found no real or substantial overbreadth (that could not await case-by-case analysis) in light of the exemptions and whereas clauses, Brevard County respectfully requests this Court to conclude similarly in the instant case. Petitioner Frandsen was, by his own admission, engaged in a political protest. Brevard County submits that Petitioner certainly was not "chilled" in the exercise of his First Amendment rights on September 9, 1995, the date of his arrest. Moreover the ordinance's exemptions and whereas clauses provide ample protection to safeguard protected speech and, therefore, not discourage the exercise of constitutionally protected rights. Brevard County respectfully submits that Petitioner does not have standing, nor does there exist real or substantial overbreadth, per *Café 207, Broadrick*, and *Geaneas, supra*.

Defendant also asserts that ordinance exemptions 6.b. and 6.c. are vague and overbroad. However, upon closer inspection it appears that Defendant's complaints are actually of the due process/vagueness genre (i.e., it is alleged that the language fails to provide adequate notice of the proscribed activity and/or leads to arbitrary or discriminatory enforcement); this is not to be confused with the first amendment overbreadth doctrine enunciated above. In any case, Brevard County submits that the overbreadth doctrine does

not apply to the same exemptions that, as the *Café 207* court put it, "step in to safeguard . . . protected speech."[5] It is difficult to follow the logic that the same language which is praised in *Café 207* as being protective of free speech and diminishing any overbreadth concerns, is also the cause of the opposite effect of "chilling" first amendment activity. The *Café 207* court analyzed and upheld the *entire* St. John's ordinance under the overbreadth principles of *Broadrick* and *Geaneas,* including the nearly identical exemption language questioned herein. Brevard County simply requests this Honorable Court to reach the only result consistent with precedent, logic and common sense and conclude that the lower courts were correct to find Petitioner Frandsen 1) had no standing to assert that the ordinance is overbroad; and that 2) there exists no real or substantial overbreadth with regard to the ordinance exemptions.

C. The lower courts' decisions are consistent with the United States Supreme Court decisions regarding vagueness.

Petitioner argues that the ordinance is facially vague and therefore unconstitutional under the Due Process clause of the Fourteenth Amendment. Brevard County asserts that the defendant lacks standing to even raise the issue of vagueness.

A person whose conduct clearly falls within the prohibition of the statute cannot reasonably be said to have been denied adequate notice of the proscribed conduct. *McKenney v. State,* 388 So.2d 1232,1234 (Fla. 1980) (*citing, Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) ("We find that the defendant in this case lacks standing to complain of lack of notice since the facts adduced at trial reveal conduct which manifestly falls within the ambit of the assignation statute. Mr. Whitley testified: 'I had seen her [the defendant] and I drove up and we just agreed to do what we did' [referring to the subsequent sexual act"]). In *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed.2d 310, 96 S. Ct 2440 (1976), this Court analyzed a City of Detroit zoning ordinance which

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[5] *Café 207, supra* at 648.

regulated adult movie theaters. This Court would not consider a vagueness challenge in the abstract and held that the Respondents, who operated adult movie theatres, did not have standing to assert vagueness where the ordinances were "unquestionably applicable" to the Respondents.

The conduct of Petitioner so clearly falls within the prohibitions of the ordinance that he cannot claim he lacked notice as to what conduct the ordinance proscribed. In this case, on September 9, 1995, the Petitioner was on a public beach wearing no clothing or items of coverage other than a hat on his head and an armband. This conduct is clearly and precisely proscribed by the ordinance which requires that the adult human male genitals and buttocks be covered. Thus, Petitioner has no standing to claim lack of notice, nor can he assert a charge of vagueness in the abstract. *Young* and *McKenny, supra*. Furthermore, Petitioner, who was protesting the ordinance, was informed by the deputies on the scene that he was in violation of the county ordinance and was subject to arrest if he remained nude. The defendant was put on specific notice that his conduct was unlawful, yet he chose to remain nude anyway. Defendant, therefore, has no standing to claim he lacked notice of what exposure is proscribed when his conduct is so blatantly within the ambit of the ordinance's prohibitions; nor does he have standing to allege vagueness in the abstract or on behalf of third parties. *McKenny, Young* and *Broadrick, supra.*

Even assuming that the Court finds that Petitioner has standing, Brevard County submits that the ordinance survives the vagueness test, a two-part analysis. First, the subject statute or ordinance must provide persons of common intelligence adequate notice as to the nature of the proscribed conduct. Second, the wording of the statute or ordinance may not be so imprecise as to invite arbitrary and discriminatory enforcement. *S.E. Fisheries v. Dept. of Nat. Resources*, 453 So.2d 1351 (Fla. 1984) (Supreme Court of Florida held that the term "fish trap" is not so vague that persons of common intelligence must guess at its meaning. The Court added that if the definition of "fish trap" were more precise, then the purpose of the statute could be easily circumvented.); *See also, City of Daytona Beach v. Del Percio*, 476 So.2d 197, 200 (Fla. 1985) (The fact that several interpretations of an ordinance may be possible does not render it void for vagueness, but when regulations "are set out in

terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, [there is no] sacrifice to the public interest.").

The language contained in exemptions 6(b) and 6(c) is clear and puts persons of common intelligence on notice of the proscribed conduct and it also draws a bright line for law enforcement, thereby eliminating any invitation of selective enforcement due to imprecise language. In *Café 207, supra* , the court analyzed a vagueness challenge against virtually the same exact exemption language questioned herein. The court reasoned at page 649:

> Merely because it is impractical if not impossible to precisely describe in words all of the types of nude performances falling within the protection of the First Amendment does not make the exception unconstitutionally vague. Case-by-case adjudication is required and will satisfy the due process requirements of the Fourteenth Amendment.

The *Café* court went on to explain that if this nudity exception is condemned for vagueness, then the obscenity laws[6] must also be unconstitutionally vague. The court then reiterated that, as with obscenity laws, a case by case analysis will satisfy due process. See also *Department of Legal Affairs v. Rogers*, 329 So.2d 257 (1976). In *Rogers*, the Supreme Court of Florida upheld, against a vagueness challenge, an act proscribing "unfair or deceptive" trade practices. The court also found that the act's language providing that "due consideration and great weight shall be given to the interpretations of the . . . federal courts" (relative to whether trade practices are "unfair" or "deceptive") was not an unconstitutional delegation of legislative authority, where the court interpreted the act to mean decisions already existing prior to enactment. *Id.* at 267. In exemption 6(c), the ordinance *sub judice* refers to "existing judicial decisions," thereby avoiding the need for judicial construction and

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[6] Under *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 2615 (1973) obscenity laws leave protection of First Amendment values to the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."

avoiding any vagueness (or unconstitutional delegation of legislative authority) challenges per *Rogers*.

In addition to *Café 207, S.E. Fisheries, Rogers* and *Del Percio, supra,* consider the following sampling of cases, upheld under the charge of vagueness, which lack the clarity and precision of the language challenged herein: *See, Bell v. Cox*, 642 So.2d 1381 (Fla. 5th DCA 1994) (Statute awarding attorney's fees upon owner's "unreasonable refusal" was not unconstitutionally vague as language was sufficiently clear so that persons of common intelligence could understand its meaning); *McKenney v. State*, 388 So.2d 1232 (Fla. 1980) (Florida Supreme Court held that assignation statute — Section 796.07(3)(a), Fla. Stat. — making it illegal "to offer to commit, or to commit, or to engage in, prostitution, lewdness, or assignation" was not unconstitutionally vague nor overbroad); *United States v. Hymans*, 463 F.2d 615 (10th Cir. 1972) (Court held the term "indecent conduct" is not unconstitutionally vague); *cf. Coates v. Cincinnati*, 402 U.S. 611, 29 L Ed.2d 214, 91 S.Ct. 1686 (1971) (Supreme Court found Cincinnati ordinance unconstitutionally vague where ordinance made it a criminal offense for three or more persons to assemble on a sidewalk "and there conduct themselves in a manner annoying to persons passing by.")

For all the foregoing reasons, Brevard County submits that the lower court decisions correctly held that the ordinance was not unconstitutionally vague.

CONCLUSION

Since the decision of the lower court is consistent with prior decisions of this Court, the Petition should be denied.

Respectfully submitted,

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APPENDIX EXHIBIT "A"

IN THE DISTRICT COURT OF APPEAL OF
THE STATE OF FLORIDA
FIFTH DISTRICT

MARVIN FRANDSEN,

Petitioner,

v. Case No. 98-2611

STATE OF FLORIDA,

Respondent.
_____/

DATE: January 25, 1999

BY ORDER OF THE COURT:

ORDERED that the PETITION FOR WRIT OF CERTIORARI, filed September 29, 1998, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Mark Tietig, Esq.
Mark R. Brown
Office of the Attorney General, Daytona Beach
Hon. Edward J. Richardson
Hon. Warren Burk
Hon. Edward M. Jackson

APPENDIX EXHIBIT "B"

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

MARVIN FRANDSEN

Defendant/Appellant,

v.

STATE OF FLORIDA

Plaintiff/Appellee

_____/

APPELLATE DIVISION
CASE NO. 97-23494-ACA
TRIAL COURT CASE NO.
95-22547-COA

Decision filed:

Appeal from County Court

Mark E. Tietig, Esq.
6065 S. Tropical Trail
Merritt Island, FL. 32952
Attorney for Appellant/Defendant

Office of the State Attorney
Attorney for Plaintiff/Appellee

RICHARDSON, Edward J.,

Appellant was charged with violating the Brevard County Anti-Nudity Ordinance #95-21, which prohibits public nudity. Appellant filed a Motion to Dismiss the charge based upon the alleged unconstitutionality of the ordinance. In particular, the appellant contends that the subject Ordinance is unconstitutional, both facially and as applied in this case, and for vagueness and overbreadth. Further, and in the alternative, the appellant argues that his conduct was exempted from the prohibitions of the ordinance under sections 6(b) and (c) of the ordinance. The Trial Court denied

the appellant's motion. Thereafter, the appellant pled nolo contendere to the violation, expressly reserving his right to appeal the denial of his motion. This Court has completed a de novo review of the record, including the video tape presented to the trial court in support of the appellant's motion.

It is undisputed that on September 9, 1995, appellant was observed on Playalinda Beach, at the Canaveral National Seashore Park, in Brevard County, Florida. The appellant was wearing no clothing other than a hat and an arm band. The appellant was carrying a sign with protest messages and he was speaking to a group of people at the time of his arrest.

Statutes and ordinances normally are the beneficiaries of a presumption of constitutionality which the attacker must refute. However, where an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to defend the constitutionality of that regulation beyond a reasonable doubt. See, Hefffier v. International Society for Krishna Consciousness. Inc., et al 452 U.S. 640, 658, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

The First Amendment literally forbids the abridgment only "of speech". However, this protection has been expanded beyond the spoken or written word, to include some forms of expressive conduct.

In the instant case, the subject ordinance regulates conduct rather than "speech". Simply stated, it is illegal in Brevard County to be nude in a public place. However, the exemptions set forth in sections 6(b) and 6(c) of the Ordinance remove from its' prohibition expressive conduct that may be "sufficiently inbred with elements of communication to fall within the scope of the First and Fourteenth Amendments". See, Spence v. Washington, 418 U.S. 405, 409. 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since the subject Ordinance proscribes "conduct" rather than speech, this Court finds that the burden rests with the appellant to demonstrate the unconstitutionality of the Ordinance.

In deciding whether particular conduct possesses sufficient

communicative elements to bring the First Amendment into play, it is necessary for the Court to analyze whether the appellant had an intent to convey a particularized message and (whether) the likelihood was great that the message would be understood by those who viewed it. See U. S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L. Ed.2d 672 (1968).

Nudity, in and of itself, is not activity protected by the First Amendment. See, South Florida Free Beaches v. City of Miami. 734 F. 2d 608 (11th Cir. 1984); Barnes v. Glenar Theatre, Inc., 501 U.S. 560, 571, 111 S.Ct. 2456, 2463, 115 L. Ed.2d 504(1991).

This Court cannot conclude as a matter of law that the appellant's conduct in going nude in public was sufficiently inbred with elements of communication to fall within the scope of protected expression under the First Amendment. Indeed the nudity added nothing to the message. Therefore, it cannot be said as a matter of law, that through the appellant's nudity it was likely that the viewers would understand the message. The Trial Court was correct in denying the appellant's motion to dismiss on this legal issue. Perhaps, had the appellant elected to go to trial, in lieu of a plea, a jury question would have been created as to whether his conduct fell within the exemptions of the ordinance. The Trial Court's ruling of course, was confined only to questions of law. See, Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). As long as the ordinance was (1) within the constitutional power of the government; (2) it furthered the important or substantial government interest in protecting societal order and morality, as well as providing for the public health and safety; (3) the government interest was unrelated to the expression of free expression; and (4) the incidental restriction of alleged First Amendment freedom was not greater than essential to the furtherance of the government interest, the legislation will be upheld. U.S. v. O'Brien, supra. This Court finds that the subject Ordinance meets this test, and is therefore, constitutional on its' face and as applied in this case. See,; Cafe 207, Inc., v. St. John's County, 856 F.Supp. 64 (M.D. Fla. 1994), aff. 66 F.3d 273 (11th Cir. 1995), cert. den. 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996).

The Brevard County Ordinance serves several important and

substantial government interests, including the protection of Order and morality. The Ordinance was enacted as an exercise of the County's police power. The subject Ordinance in no way prohibits the appellant from expressing his views in a public forum. Each of the appellant's stated messages can be effectively communicated to anyone willing to listen without resorting to public nudity. The same constitution that guarantees a right of free speech also provides for a representative form of government that will pass laws consistent with the Constitution and will of the people. The people of Brevard County, speaking through their elected officials have said that public nudity is not an acceptable form of conduct. Keeping our public streets, parks and beaches free from naked people appears to be a goal that is consistent with the protection of societal order and morality, as well as one that helps to assure public health and safety. If such law somehow restricts First Amendment freedoms, this Court finds that restriction to be incidental to the important governmental interest.

The appellant argues that even if the subject Ordinance applies to him, and is Constitutional when so applied, it is nevertheless unconstitutional and unenforceable because it is a criminal statute with broad implications capable of sweeping within its am bit protected speech or expression of those not before the court.

As to the overbreadth claim, the cases of Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2906, 37 L.Ed.2d 830 (1973), and Geaneas v. Willets, 911 F.2d 579 (11th Cir. 1990), cert. denied, 499 U.S. 955, 111 S.Ct. 1431, 113 L.Ed.2d 484 (1991) are controlling. In Broadrick, the Court noted that where conduct and not merely speech is involved, "the overbreadth of the statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep". It is this Court's view that Brevard County Ordinance #95-21 is not substantially over broad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions may not be applied. d., at 615-16.

The appellant's conduct in the instant case, i.e. public nudity, is exactly what the ordinance 's designed to prohibit. The core

concern" of Brevard County is to prohibit persons from being naked in public. In Geaneas supra, the Court stated:

> The Plaintiffs conduct in the present case moreover rests extremely close to this core, whether or not the ordinance reaches to conduct at a distance from the core concerns. The plaintiffs clearly have no standing under Broadrick to challenge on this basis, the ordinance's application to them. The Plaintiffs overbreadth argument lacks foundation.

The appellant argues that the exemptions set forth in sections 6(b) and 6(c) of the ordinance are unconstitutionally vague. Such vagueness, it is argued, arises from the need to interpret the various words or qualifiers in section 6, which exempt constitutionality protected expression from the scope of the ordinance.

It is clearly impossible to draft an ordinance that would embody all forms of expressive conduct that would be protected from governmental restriction under the First and Fourteenth Amendments. It is for this reason that Exemptions 6(b) and (c) are worded in rather broad terms. However, a review of these exemptions demonstrates clear language sufficient to put a person of common intelligence on notice of the proscribed and exempted conduct. See, Cafe 207, supra.

For the reasons stated, the decision of the Trial Court denying the appellant's Motion to Dismiss be and the same is hereby AFFIRMED.

Burk, Warren, Judge - concurs.
Jackson, Edward, Judge - recused.

APPENDIX EXHIBIT "C"

IN THE COUNTY COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff, CASE NUMBER 95-22547-COA

vs.

MARVIN VAUN FRANDSEN,
Defendant.

ORDER DENYING DEFENDANT'S AMENDED MOTION TO DISMISS

This cause came before the Court, and the Court having heard testimony, having considered the exhibits and Memorandums of Law submitted by counsel for the State and the Defense, and having heard oral argument from both counsel, does hereby enter its Order as follows:

The Court finds that Brevard County Ordinance 95-21, which prohibits nudity in Brevard County, is constitutional both on its face and as applied to the Defendant The ordinance is not unconstitutionally vague or overbroad. The ordinance does not violate the Defendants rights under the First Amendment or Fourteenth Amendment of the Constitution. More specifically, the conduct of the Defendant is not protected as free speech, political protest or freedom of religion; the ordinance does not act as a prior restraint and the enforcement of the ordinance is not in violation of the Defendant's due process or equal protection rights. Further, the Defendant's conduct is not protected under any exemption contained within the ordinance.

The Court relies on its review of all case law submitted, but especially on the cases of Barnes vs. Glenn Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct 2456 (1991); United States vs.

O'Brien, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct 1673 (1967) and Cafe 207, Inc. vs. St. John's County, 856 F.Supp. 641 (M.D. Fla. 1994), affirmed 66 F.3d 272 (11th Cir. 1995), cert. denied 116 S.Ct. 1544, 134 L.Ed.2d 647 (1996) as well as prior rulings from Brevard County Court Judges in State of Florida vs. Kristina Davis, 95-26139-COA, 95-25568-COA, and State of Florida vs. Erin Stillmayer, 95-22349-COA.

It is therefore, ORDERED and ADJUDGED that Defendant's Amended Motion to Dismiss for Unconstitutionality, Both Facially and as Applied, and for Vagueness and Overbreadth, is hereby DENIED on all grounds. DONE AND ORDERED at Viera, Brevard County, Florida, this 29 day of July, 1997, nunc pro tunc July 25, 1997.

/s/ Peter Haddad
HONORABLE PETER HADDAD
COUNTY COURT JUDGE

copies:

Michelle E. Jackson, Assistant State Attorney
Kyle P. King, Assistant County Attorney
Mark Tietig, Attorney for Defendant

APPENDIX EXHIBIT "D"

IN THE COUNTY COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO. 95-26139-MMA
95-25568-MMA

STATE OF FLORIDA

Plaintiff

vs.

KRISTINA DAWN DAVIS

Defendant

_____/

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

THIS CAUSE having come on to be heard on the Defendant's Motions to Dismiss Information in the above styled causes of action and that the Court having heard arguments of counsel on several occasions and further having been provided and taking into consideration the Defendant's Memorandum of Law dated June 3, 1996 along with the Memorandum of Law in Opposition to Defendant's Motion to Dismiss provided by the State on June 3, 1996 with Notice of Supplemental Authority filed by the State on June 6, 1996 and the Court being otherwise fully advised in the premises does hereby find the following:

The Defendant in filing her Motion to Dismiss has raised constitutional issues alleging the unconstitutionality of County Ordinance 95-21 as it relates to these causes of action. Specifically, the Defendant has raised first amendment issues including free speech, the right to protest and overbreath, has also raised a due process issue of vagueness in said ordinance along with two issues pertaining to the Defendant's right to equal protection and finally, an issue related to selective enforcement. In the Defendant's Memorandum of Law the Defendant has conceded the issue of selective enforcement and for current purposes waives that issue. The Defendant has further waived the issues of overbreath and vagueness. These issues, having been waived and will not be considered by this Court at this time.

The facts of this case are as follows:

On October 24, 1995 the Defendant was allegedly standing on the side of a public roadway located in Brevard County, Florida in a thong bikini bottom wearing only pasties over the areola and nipples of her breasts, the remaining portions of her breasts not being covered (Case No. 95-25568-MMA). On November 6, 1995 the Defendant was standing in the same area of a public roadway located in Brevard County, Florida wearing only a thong bikini bottom with no covering of any portion of her breasts. On her body were written and/or drawn sentiments against Brevard County Ordinance 95-21 which Ordinance is being herein challenged by the Defendant.

FIRST AMENDMENT

The first issue is weather [sic] the Defendant's conduct in exposing her breasts in protest of Ordinance 95-21 is protected speech and conduct under the First Amendment of the United States Constitution and Article I, Sections 4 and 5 of the Florida Constitution. The Defendant alleges that she was engaged in a political protest on November 6, 1995 when she was arrested for being in violation of said Ordinance.

Nudity in and of itself is not a constitutionally protected activity. McGuire v. State, 489 So. 2d 729 (Fla. 1986). "[P]ublic nudity does not convey any specific message, at most it is a medium by which a variety of messages may be conveyed. The medium of nudity is not a particular message, the medium is simply the medium." Craft v. Hodel, 683 F.Supp. 289, 292 (D. Mass. 1988). Nudity is protected as speech only when combined with some mode of expression which itself is entitled to First Amendment protection. South Florida Free Beaches v. City of Miami, Florida, 734 F. 2d 608 (11th Cir. 1984).

In O'Brien v. United States, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), the Supreme Court has enunciated a test for determining the constitutionality of restrictions on symbolic speech or expressive conduct.

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 319 U.S. at 376, 377.

O'Brien has been used to uphold an anti-nudity Ordinance from St. Johns County, Florida. Cafe 207, Inc. v. St. Johns County, 856 F.Supp. 641 (M.D. Fla. 1994),

affirmed 66 F.3d 273 (11th Cir. 1995), cert. den. April 22, 1996. In Cafe 207, the owner and dancers of an adult entertainment establishment challenged St. Johns County's anti-nudity ordinance. One of the bases of the challenge was that the act of nude dancing is expressive conduct or symbolic speech and protected by the First Amendment against such an ordinance. The Court applying O'Brien found quickly that the first three elements of the test were met:

> The law, as an exercise of the County's police power, is clearly within its constitutional authority. It also serves a substantial and important governmental interest in protecting order and morality and in combating the secondary effects of nudity in adult entertainment establishments of the sort typified by the Plaintiff's Cafe Erotica. And, neither of those governmental interests is related to the suppression of free expression as such. Cafe 207 at 644.

The Court concluded that the incidental restriction on the First Amendment freedoms was no greater than was essential to the furtherance of the governmental interests served by the ordinance. The Court acknowledged that there was "a line in every case beyond which the lawmakers cannot go in requiring clothing or prohibiting exposure in some contexts" but that the St. Johns ordinance did not cross that line. Cafe 207 at 646.

It is this Court[']s ruling in applying the O'Brien test to Brevard County Ordinance 95-21 that:

1. The ordinance was enacted within the constitutional authority of the county and its police powers.

2. The ordinance furthers important or substantial governmental interests in protecting societal order

and morality and suppressing the adverse secondary effects that public nudity generates; and to protect and preserve the health, safety and welfare of people of Brevard County.

3. The governmental interest is not related to the suppression of free expression.

4. The incidental restriction on the First Amendment freedoms of the Defendant in this case are no greater than essential to the furtherance of governmental interests.

This Court rules that the conduct of the Defendant in this case, appearing nude from the waist up, to protest is not entitled to protection under the First Amendment.

The Defendant argues that because this was a political protest, the conduct of appearing nude in public should not be abridged. In Adderley v. State, 385 U.S. 39, 17 L.Ed.2d 149, 87 S.Ct. 242, the Supreme Court held that convictions for trespass did not unconstitutionally deprive defendants of their rights to freedom of speech, press, assembly, or petition. The defendants in this case were protesting the arrest of other protesters and segregation. The protest was at the local jail in the driveway near the jail entrance. The defendant had argued that they had a constitutional right to stay on the property because the "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . ." Adderley, at 47. In response to this argument, the Court states:

> Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected.. . .We reject it again.

It is this Court[']s ruling that the Defendant in this case does not have the unrestricted right to do as she pleases, where she pleases in the name political protest.

EQUAL PROTECTION

The Second major issue which is addressed by the parties in this case is Equal Protection. The Defendant contends that Brevard County Ordinance 95-21 is unconstitutional on its face by creating two separate classifications which will be addressed independently.

Male v. Female

Gender based classifications are tested by an intermediate scrutiny test, whether the classification bears a substantial relationship to important governmental objectives. Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451 (1976). (See United States v. Biocic, 928 F.2d 112 (4th Cir. 1991); Eckel v. Davis, 51 Cal.App.3d 831, 124 Cal.Rptr. 685 (1975).

It is the defendant's position that these cases which have held that the classification between the male and the female breast is not a violation of equal protection have been based upon the:

> [I]mplicit. . .reasoning of all of these decisions is the underlying assumption that the female breast is sufficiently different from the male breast to justify the different standard applied to the public expose [sic] of each type of breast. However, it is also absolutely evident from the cases that this distinction takes on constitutional meaning only because of the courts' acceptance that traditional concepts of morality and concepts of public decency buttress the distinction. Without the moral/decency nexus there would be no rational basis to distinguish between the

public exposure of either type of breast.
Defendant's Memorandum of Law p. 13.

It is argued that there is no longer the support for the gender bases [sic] classifications. That societal views of women and concepts of public morality and decency have changed rendering these classifications and unconstitutional denial of equal protection. That argument is hereby rejected by this Court. In rejecting the above argument, the Court further rejects the ruling in People v. David, 585 N.Y.S.2d 149 (N.Y. 1991) wherein said Court found that "male and female breasts are physiologically similar except for lactation capability." David at 68.

Female v. Female breast feeding

The second classification which the Defendant challenges is the allowance in Brevard County Ordinance 95-21 for exposure of a female's breast in conjunction with breast feeding. The Defendant claims that in one instance the act of exposing a breast is criminalized but in another it is not.

A rational basis test would be applicable to an equal protection analysis as to this type of classification which does not involve a fundamental or constitutionally protected right. Does the ordinance bear a rational relationship to a legitimate governmental purpose?

The exemption for the exposure of a breast of a female breast feeding a child from the ordinance is in deference to Section 383.015, Fla. Stat. (1995) which allows for breast feeding in public.

The Defendant in this case contends that the exposure of the breast is the same and that the basis for not allowing the exposure still remains, that the exposure is morally offensive. And given the legislative approval of breast feeding in public, there is no longer a legitimate governmental interest in the distinction (i.e. the changing societal views and morality).

The State's position is that the intentional exposure of a breast is not the same as the exposure of a breast while breast feeding and that the legislature has considered the policy behind allowing breast feeding. It asks that the Court acknowledge that the classification is reasonable and that anything further by the court would be an "inappropriate infusion of judicial will upon the legislative body." Memorandum of Law in opposition to Defendant's Motion to Dismiss p. 14.

There appears to be no case law addressing the breast feeding aspect at applied to a nudity ordinance or statute. It is then left to this Court to make a determination as to whether Brevard County Ordinance 95-21 bears a rational relationship to a legitimate governmental purpose. This Court finds that the rational basis for this classification would be that the legislature has considered the merits to allowing breast feeding (nurturing and health of child, family values, etc.) and weighed them against the moral values of society and believed that breast feeding was a greater interest and that the offensiveness of exposing the breast was incidental to this interest, thereby carving out an exception for breast feeding.

Based upon the foregoing analysis it is hereby ORDERED and ADJUDGED that the Defendant's Motion's [sic] to Dismiss Information in case numbers 95-25568-MMA and 95-26139-MMA are hereby denied.

DONE and ORDERED in Melbourne, Brevard County, Florida, this 17th day of July, 1996.

//s// Philip Fougerousse
PHILIP FOUGEROUSSE
County Court Judge

APPENDIX EXHIBIT "E"

IN THE COUNTY COURT OF
THE EIGHTEENTH JUDICIAL
CIRCUIT, IN AND FOR
BREVARD COUNTY, FLORIDA

CASE NO. 96-19741-ACA

KRISTINA DAWN DAVIS,
Appellant,

vs.

STATE OF FLORIDA
Appellee.
_____/

Decision filed:

Appeal from Brevard County Court

Burton J. Green, Esq.
Attorney for Appellant

Michelle E. Jackson, Esq.
Assistant State Attorney
Attorney for Appellee

PER CURIAM.

This case is the result of an appeal from two lower criminal cases where the Appellant was charged with violations of Brevard County Ordinance 95-21 which prohibits appearing nude in a public place. The Appellant moved to dismiss both cases on Equal Protection and First

Amendment grounds. The motions were denied by the trial court. The Appellant then pled nolo contendere specifically reserving her right to appeal the denial of her motions to dismiss. This Court has jurisdiction.[1]

The Appellant is a hot-dog vendor operating a hot-dog cart by the side of the road. On one occasion she proceeded to sell hot-dogs wearing only a thong bikini bottom and pasties on her breasts. This is one of the two cases consolidated on appeal. On another occasion, the Appellant protested the anti-nudity ordinance, 95-21, by wearing only a thong bikini bottom and no top such that her breasts had no covering while standing and waiving at the side of the road. On her body, including her breasts, she had protest writings directly on her skin. In addition, she carried a sign of protest. In both cases she was arrested for violating the county anti-nudity ordinance. The Appellant argues that the exposure of her breasts as an act of political protest was constitutionally protected conduct under the First Amendment. The Appellant further argues that the anti-nudity ordinance violates equal protection both as applied to the male gender and as applied to nursing females who may legally expose a breast while feeding a child.

The Appellant does not dispute that she violated Ordinance 95-21. Rather she argues that her constitutional rights as presented outweigh any requirement to adhere to this ordinance. We disagree. Ruling only on the facts before this Court, we hold that the Appellant was not entitled "constitutionally" to violate the ordinance as part of her protest against the ordinance. First, the ordinance clearly withstands scrutiny under the four part test enunciated in United States v. O'Brien, 391 U.S. 367, 20 L.Ed2d 672, 88 S.Ct. 1673 (1968):

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[1]Rule 9.030(c)(1)(A), Fla. R. App. P.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 391 U.S., 367 and 376.

In O'Brien the Court reiterated it's position that when "speech" and "nonspeech" elements are combined in the same course of conduct, an incidental limitation on First Amendment freedoms is justified if there is a "sufficiently important governmental interest" in regulating the "nonspeech" element. Id. See also Barnes v. Glen Theatre, Inc., 501 U.S. 560, 115 L.Ed.2d 504, 111 S.Ct. 2456 (1991); Cafe 207, Inc. v. St. Johns County, 66 F.2d 272 (11th Cir. 1995) (affirming the district court at 856 F.Supp. 641 (M.D. Fla. 1994)).

In Adderley v. State of Florida, 385 U.S. 39, 46, 17 L.Ed.2d 149, 87 S.Ct. 242, 246 (1966) the Court reaffirmed it's position against the view that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." In that case the Court held that protesters did not have the contitutional [sic] protection to trespass on the property of the county jail in a protest against prior arrests made on fellow college students.

Therefore the Appellant did not have the inherent right to break the very ordinance that she has a First Amendment right to protest. She could very well have demonstrated against and protested the ordinance by standing along side of the road with protest signs or posters without exposing her breast to the public. Based upon this holding,

this Court does not address the merits of the Appellant's Equal Protection arguments.

The trial court is AFFIRMED.

JACOBUS, Bruce W., and HOLCOMB, Charles M., JJ concur.

JOHNSTON, Lawrence V., specially concurs with opinion.

Johnston, Lawrence V., concurring.

Apparently nudity bothers some people.

The Brevard County Sheriff's Office arrested the Appellant on October 24, 1995 for appearing in public (selling hotdogs) on the side of U.S. Highway 1. On that date and at that location, she wore less clothing than required to keep from violating Brevard County Ordinance 95-21.

The cost of prosecution and appeal of this particular incident surely must outweigh the benefit to the fair citizens of Brevard in the short run. In the long run, it is the price we pay to contain members of our society within some moral or cultural boundary. Sadly, some people must need them. On one side of the boundary are the people who want things as they were, i.e., covered. On the other side of the boundary are the people who annoy the others. "Common decency" and "propriety" are not concepts given to universal understanding. It is only a shame that the boundary cannot be drawn in such a manner that all citizens in our community cannot agree to stand on the same side of it. Living in our society and running government is not a game. There should be no need to waste tax money on these endless battles.

The second part of this case deals with the Appellant's arrest on November 5. It is for this incident which I find no legal support of the Appellant's position. I find only a manipulative intent to lower the dignity of the concepts of freedom of speech and equal protection and to obtain publicity. Squandering our constitutional rights for

commercial benefit is ill-advised. There are more worthy projects for our citizens, our lawyers and our judges.